

## CHAPTER 37 TERMINATION OF CONTRACTS

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### 3700 GENERAL PROVISIONS

- 3700.1 The contracting officer may terminate a contract for the convenience of the District, in whole or in part, if the contracting officer determines that the termination is in the best interests of the District.
- 3700.2 The contracting officer may terminate a contract for default, in whole or in part, if the termination is in the best interests of the District, and the contractor does any of the following:
- (a) Fails to deliver the supplies or complete the work or services within the time specified in the contract or any modification;
  - (b) Fails to make sufficient progress on contract performance so as to endanger performance of the contract within the time specified or in the manner specified in the contract;
  - (c) Fails or refuses to go forward with the work in accordance with the directions of the contracting officer;

- (d) Expresses through word or conduct an intention not to complete the work in a timely manner; or
  - (e) Fails to perform any of the other provisions of the contract.
- 3700.3 The contracting officer may effect a no-cost settlement instead of issuing a termination notice when the following circumstances apply:
  - (a) The contracting officer knows that the contractor will accept a no-cost settlement;
  - (b) District property was not furnished to the contractor; and
  - (c) There are no outstanding payments, debts due to the District, or other contractor obligations.
- 3700.4 If the same item is under contract with a business that is not certified with the Minority Business Opportunity Commission (MBOC) and a business that is certified by the MBOC, and it is necessary to terminate for convenience part of the units still to be delivered, the contracting officer shall give preference to the continuing performance of the certified minority business by terminating all or part of the contract held by the non-certified business unless the Director determines that to do so is not in the best interests of the District.
- 3700.5 Upon written consent of the contractor, the contracting officer may reinstate the terminated portion of a contract, in whole or in part, by amending the notice of termination if the contracting officer determines that the following circumstances apply:
  - (a) There is a definite requirement for the terminated items; and
  - (b) Reinstatement is in the best interests of the District.
- 3700.6 When the price of the undelivered balance of a contract is less than two thousand dollars (\$2,000), the contracting officer shall not terminate the contract for convenience, but shall permit it to run to completion.
- 3700.7 When a construction contract is terminated, the contracting officer shall take action to ensure site cleanup, protection of serviceable materials, removal of hazards, and other steps necessary to leave a safe and healthful site.
- 3700.8 In each solicitation and contract, the contracting officer shall include a clause, approved by the Director, that gives notice of the District's right to terminate the contract for convenience or default. The contracting officer shall also insert a clause, approved by the Director, which gives notice of exceptions to the District's right to terminate for default when the delay or failure to perform is excusable due to causes beyond the control and without the fault or negligence of the contractor.

**AUTHORITY:** Unless otherwise noted, the authority for this chapter is the District of Columbia Procurement Practices Act of 1985, D.C. Law 6-85, as amended, D.C. Code §1-1181.1 *et seq.* (1981).

**SOURCE:** Final Rulemaking publishing at 35 DCR 1689 (February 26, 1988).



**3701 NOTICE OF TERMINATION**

- 3701.1 The contracting officer shall terminate a contract for convenience or default by giving written notice to the contractor. The notice shall be hand-delivered, sent by telegram, or sent by certified mail, return receipt requested.
- 3701.2 When the termination notice is delivered by hand, the contracting officer shall obtain a written acknowledgement of receipt from the contractor.
- 3701.3 If the termination notice is sent by telegram, the contracting officer shall deliver or send a confirming letter to the contractor by certified mail, return receipt requested.
- 3701.4 In addition to the requirements set forth in §3702.2 (termination for convenience) and §3713.2 (termination for default), the termination notice shall state the following:
- (a) The contract number and date;
  - (b) That the contract is being terminated, either for the convenience of the District or for default under the contract clause authorizing the termination;
  - (c) The effective date of termination;
  - (d) If the termination is only partial, the extent of termination;
  - (e) Any special instructions; and
  - (f) The steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force.
- 3701.5 When the termination notice is delivered or sent to the contractor, the contracting officer shall simultaneously deliver or send a copy to the using agency or agencies and to any known assignee, guarantor, or surety of the contractor.
- 3701.6 The contracting officer may amend a termination notice to accomplish any of the following:
- (a) Correct nonsubstantive mistakes in the notice;
  - (b) Add supplemental data or instructions; or
  - (c) Rescind or modify the notice if it is determined that items terminated had been shipped or completed before the contractor's receipt of the notice.
- 3701.7 An amendment to a termination notice shall be in writing and shall be delivered or sent to the contractor in the manner set forth in this section.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1690 (February 26, 1988).

**3702 NOTICE OF TERMINATION FOR CONVENIENCE**

3702.1 After receipt of notice of termination for convenience, the contractor shall immediately comply with the notice, except as otherwise directed in writing by the contracting officer.

3702.2 In addition to the requirements of §3701, the notice of termination for convenience shall require the contractor to do the following:

- (a) Stop work immediately on the terminated portion of the contract and make no further shipments and place no further orders relating to the terminated portion of the contract;
- (b) Perform any continued portion of the contract;
- (c) Stop issuing subcontracts pertaining to the terminated portion of the contract;
- (d) Terminate all subcontracts related to the terminated portion of the contract;
- (e) Promptly notify the contracting officer in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract or in which a lien has been or may be placed against termination inventory to be reported to the District;
- (f) Settle any outstanding liabilities and proposals arising out of the termination of subcontracts, obtaining any necessary approvals from the contracting officer;
- (g) Immediately advise the contracting officer of any special circumstances precluding the stoppage of work;
- (h) If applicable, promptly submit a request for an equitable adjustment of price for the continued portion of the contract, supported by evidence of any increase in cost;
- (i) Take necessary or directed action to protect and preserve property in the contractor's possession in which the District has or may acquire an interest and, as directed by the contracting officer, deliver the property to the District;
- (j) Dispose of termination inventory, as directed or authorized by the contracting officer; and
- (k) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules, in accordance with §3708.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1692 (February 26, 1988).

**3703 SETTLEMENT AFTER TERMINATION FOR CONVENIENCE**

3703.1 After issuing a notice of termination for convenience, the contracting officer shall be responsible for negotiating any settlement with the contractor. The contracting officer shall attempt to settle in one agreement all rights and liabilities of parties



involved in the terminated contract except those arising from any portion of the contract still in effect.

- 3703.2 Consistent with the notice of termination for convenience, the contracting officer shall do the following:
- (a) Direct the action required of the prime contractor;
  - (b) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors; and
  - (c) Promptly negotiate settlement with the contractor and enter into a settlement agreement.
- 3703.3 If all of the elements of the settlement cannot be agreed upon between the contractor and the contracting officer, the contracting officer shall follow the procedures set forth in §3705 for settlement by determination for those elements that cannot be settled by agreement.
- 3703.4 After a settlement agreement is completed under §3703.2(c), the contracting officer shall promptly hold a conference with the contractor to develop a definite plan for effecting the settlement.
- 3703.5 After consulting with the contractor, the contracting officer may request any of the principal subcontractors to attend the settlement conference, if appropriate.
- 3703.6 The termination settlement shall cover the following:
- (a) Any setoffs that the District has against the contractor that may be applied against the terminated contract; and
  - (b) All settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.
- 3703.7 If any items are excepted from the settlement agreement, the contracting officer shall do the following:
- (a) Reserve in the settlement agreement any rights or demands of the parties that are excepted from the settlement;
  - (b) Ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement;
  - (c) Mark each applicable settlement agreement with a legend indicating that the settlement agreement contains a reservation and retain the contract file until the reservation is removed;
  - (d) Ensure that sufficient funds are retained to cover complete settlement of the reserved items; and
  - (e) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.

3703.8 Before execution of a settlement agreement, the contracting officer shall determine the accuracy of the District property account for the terminated contract. If a review discloses property for which the contractor cannot account, the contracting officer shall reserve in the settlement agreement the rights of the District regarding that property or make an appropriate deduction from the amount otherwise due the contractor.

3703.9 When the contracting officer cannot promptly complete settlement under a terminated contract, the contracting officer may enter into a partial settlement in the following situations:

- (a) When the issues on which the agreement has been reached are clearly severable from other issues; and
- (b) When the partial settlement will not prejudice the District's or contractor's interest in disposing of the unsettled portion of the settlement proposal.

3703.10 The contracting officer responsible for negotiating the final settlement shall establish a separate case file for each termination. This file shall include memoranda and records of all actions relative to the settlement.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1693 (February 26, 1988).

#### **3704 SETTLEMENT MEMORANDUM**

3704.1 At the conclusion of settlement negotiations, the contracting officer shall prepare a settlement memorandum containing the principal elements of the settlement for inclusion in the contract file.

3704.2 If the settlement was negotiated on the basis of individual items, the contracting officer shall specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the contracting officer shall not have to evaluate each item or group of items individually, but shall support the total amount of the recommended settlement in reasonable detail.

3704.3 The settlement memorandum shall include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1695 (February 26, 1988).

#### **3705 SETTLEMENT BY DETERMINATION**

3705.1 If the contractor and the contracting officer cannot agree on a termination settlement under §3703, or if the contractor fails to submit a settlement proposal within the period required by the termination clause, the contracting officer shall issue a determination of the amount due consistent with the termination clause.

3705.2 If the contractor submits a settlement proposal, the contracting officer shall give the contractor notice, either by hand delivery or certified mail, return receipt requested, that the contractor may submit evidence substantiating the settlement amount in its



proposal. The notice shall state a date certain by which the evidence must be received by the contracting officer.

3705.3 After reviewing any evidence submitted by the contractor and other available information, the contracting officer shall determine the amount due and shall transmit a copy of the determination to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

3705.4 The determination letter shall advise the contractor that the determination is a final decision from which the contractor may appeal under the procedures set forth in the Act, chapter 38 of this title, and the disputes clause in the contract except as specified in §3705.6. The determination shall specify the amount due to the contractor and shall explain each major item that was not allowed.

3705.5 The contracting officer shall retain all written evidence and other data relied upon in making a determination.

3705.6 The contractor may appeal any settlement by determination under the provisions of the Act, chapter 38 of this title, and the disputes clause in the contract, except when the contractor has failed to submit a settlement proposal within the time provided in the contract and has failed to request an extension of time. The filing of an appeal shall not affect the authority of the contracting officer to enter into a settlement agreement, in whole or in part, by negotiation with the contractor at any time before the appeal is decided.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1695 (February 26, 1988).

## **3706 PAYMENT AFTER SETTLEMENT**

3706.1 After execution of a settlement agreement in accordance with §3703, the contractor shall submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The contracting officer shall attach a copy of the settlement agreement to the voucher or invoice and forward the document to the appropriate office for payment.

3706.2 If the settlement is by determination under §3705, payment shall be effected in the following manner:

- (a) If there is no appeal within the allowed time, the contractor shall submit a voucher or invoice showing the amount determined due, less any portion previously paid; or
- (b) If there is an appeal, the contractor shall submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid.

3706.3 In the case of construction contracts, before forwarding the final payment voucher, the contracting officer shall ascertain whether there are any outstanding labor violations. If any violations are outstanding, the contracting officer shall determine the amount to be withheld from the final payment.

3706.4 The District shall not pay interest on the amount due under a settlement agreement or a settlement by determination. However, the District shall pay interest on amounts found due to a contractor on claims in accordance with §806 of the Act from the date the Director receives the claim.

3706.5 The total amount payable to the contractor under a settlement, before deducting disposal or other credits, exclusive of settlement costs, shall not exceed the contract price less payments otherwise made or to be made under the contract.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1696 (February 26, 1988).

#### **3707 TERMINATION OF SUBCONTRACTS**

3707.1 Upon termination of a prime contract, the prime contractor and each subcontractor shall be responsible for the prompt settlement with their immediate subcontractors. A subcontractor shall have no contractual rights against the District upon termination of the prime contract.

3707.2 Prime contractors shall settle with subcontractors in general conformity with the policies relating to settlement of prime contracts as specified in §§3703 - 3706 of this chapter.

3707.3 The failure of a prime contractor to include an appropriate termination clause in any subcontract or the failure of the contractor to exercise the rights of the termination clause shall not affect the District's right to require the termination of the subcontract and shall not increase the obligation of the District in any way whatsoever.

3707.4 In no event shall the District be required to pay the prime contractor any amount for loss of anticipatory profits or consequential damages resulting from the termination of any subcontract.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1697 (February 26, 1988).

#### **3708 SETTLEMENT PROPOSALS AND SETTLEMENT AGREEMENTS**

3708.1 The contractor shall submit to the contracting officer a settlement proposal for the amount claimed because of the termination for convenience.

3708.2 The contractor shall submit the settlement proposal within one (1) year from the effective date of the termination, unless the period is extended by the contracting officer.

3708.3 The settlement proposal shall cover all cost elements, including settlements with subcontractors and any proposed profit, and shall include reasonable detail supported by accounting data satisfactory to the contracting officer.

3708.4 For cost-reimbursement contracts, the termination clauses approved by the Director shall provide for settlement of costs and fee, if any. The contract clauses governing costs shall determine what costs are allowable.

3708.5 The settlement agreement may include all demands of the District and proposals of the contractor under the terminated contract. However, no amount shall be allowed for any item of cost disallowed by the contracting officer.



- 3708.6 If the contracting officer and contractor agree on an overall settlement of costs, agreement on each element of cost shall not be required. When appropriate, the contracting officer may compromise differences and settle doubtful costs by agreement. However, an overall settlement shall not include costs that are clearly not allowable under the terms of the contract.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1697 (February 26, 1988).

**§3709: RESERVED**

**3710 TERMINATION FOR DEFAULT**

- 3710.1 Under a termination for default, the District shall not be liable for the contractor's costs on undelivered work and shall be entitled to the repayment of advance or progress payments, if any, applicable to that work.
- 3710.2 The default clause approved by the Director shall include a statement that the contracting officer may require the contractor to transfer title and deliver to the District completed supplies. However, the contracting officer shall not use the default clause as authority to acquire any completed supplies unless it has been ascertained that the District does not already have title under some other provision of the contract.
- 3710.3 Subject to the provisions of §§3710.4, 3710.5, and 3710.6, the District shall pay to the contractor the contract price for any completed supplies and the amount agreed upon by the contracting officer and contractor for any manufacturing materials acquired by the District under the default clause approved by the Director.
- 3710.4 Before payment is made for completed or delivered supplies, services, or materials, the contracting officer shall take one (1) or more of the following measures to protect the District from potential liability to laborers and material suppliers:
- (a) Ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens;
  - (b) Require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have to the supplies and materials;
  - (c) Obtain appropriate agreement among the District, the contractor, and lienors ensuring release of the District from any potential liability to the contractor or lienors;
  - (d) Withhold from the amount due for services, supplies, or materials any amount the contracting officer determines necessary to protect the District's interests,

but only if the measures set forth in §§3710.4(a)-(c) cannot be accomplished or are inadequate; and

- (e) Take other appropriate action considering the circumstances and the degree of the contractors's solvency.

3710.5 The contractor shall be liable to the District for any excess costs incurred in reprocurring supplies or materials similar to those to be obtained under the contract terminated for default, and for any other damages, whether or not repurchase is effected.

3710.6 If a contract is terminated for default or if a course of action instead of termination for default is followed under §3714, the contracting officer shall promptly ascertain and make demand for any liquidated damages to which the District is entitled under the contract. The contract clause for liquidated damages shall be approved by the Director and shall specify that these damages are in addition to any excess repurchase costs.

SOURCE: Final Rulemaking publishing at 35 DCR 1698 (February 26, 1988).

## 3711 TERMINATION FOR DEFAULT PROCEDURES

3711.1 When a termination for default is being considered, the contracting officer shall decide which type of termination action to take after consultation with contracting and technical personnel and legal counsel.

3711.2 Except as provided in §3715.1, when a contractor has defaulted by failure to make delivery of supplies or failure to perform the services within the specified time, no notice to the contractor of the failure or of the possibility of termination shall be required before the actual notice of termination. However, if the District has taken any action that might be construed as a waiver of the contract delivery and performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the District's rights under the default clause of the contract.

3711.3 When the contractor fails to perform provisions of the contract other than those specified in §3711.2, or fails to make sufficient progress on contract performance so as to endanger performance of the contract, the contracting officer shall give the contractor written notice specifying the failure and providing a period of not less than ten (10) days in which to cure the failure. Upon expiration of the period specified in the cure notice, the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured.

3711.4 When a termination for default appears imminent, the contracting officer may provide a written notification of that fact to the surety. This notification shall not be a notice of default.

3711.5 If the contractor is a certified minority business, the contracting officer shall forward a copy of any cure notice or show cause notice under §3712 to the Minority Business Opportunity Commission.

3711.6 The contracting officer shall consider the following factors in determining whether to terminate a contract for default:



- (a) The terms of the contract and applicable laws and regulations;
- (b) The specific failure of the contractor and the excuses for the failure, if any;
- (c) The availability of the supplies or services from other sources;
- (d) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time for delivery that could be obtained from the delinquent contractor;
- (e) The degree to which the contractor is essential to the District procurement program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts;
- (f) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments; and
- (g) Any other pertinent facts and circumstances.

3711.7 In addition to the requirements set forth in §3711.6, in the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

3711.8 When a contract is terminated for default, or an alternative procedure is authorized instead of default under §3714, the contracting officer shall prepare a memorandum for the contract file explaining the reasons for the action taken.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1699 (February 26, 1988).

## **3712 NOTICE TO SHOW CAUSE**

3712.1 When termination for default appears appropriate, the contracting officer may, if it is in the best interests of the District, notify the contractor in writing of the possibility of the termination. The show cause notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated for default.

3712.2 The show cause notice shall give the contractor ten (10) days after receipt of the notice to present, in writing, any facts bearing on the case. The notice shall be hand delivered or sent by certified mail, return receipt requested.

3712.3 The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference.

3712.4 A notice to show cause may be combined with a notice to cure issued under §3711.3.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1701 (February 26, 1988).

**3713 NOTICE OF TERMINATION FOR DEFAULT**

3713.1 If, after consideration of all facts and circumstances, and after compliance with the provisions of this chapter, the contracting officer determines that a termination for default is proper, the contracting officer shall issue a notice of termination.

3713.2 In addition to the requirements of §3701, a notice of termination for default shall include the following:

- (a) The acts or omissions constituting the default;
- (b) A statement that the contractor's right to proceed further under the contract, or a specified portion of the contract, is terminated;
- (c) A statement that the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;
- (d) If the contracting officer has determined that the failure to perform is not excusable, a statement that the notice of termination constitutes a decision to that effect, and that the contractor has the right to appeal the decision under the disputes clause in the contract;
- (e) That the District reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
- (f) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal the termination under the disputes clause in the contract.

3713.3 The contracting officer shall make the same distribution of the termination notice as was made of the contract.

3713.4 The contracting officer shall furnish a copy to the contractor's surety, if any, when the notice is furnished to the contractor. The contracting officer shall request the surety to advise the contracting officer if it desires to arrange for completion of the work.

3713.5 The contracting officer shall immediately notify the payment office to withhold further payments under the terminated contract, pending further notice.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1702 (February 26, 1988).

**3714 EXCUSABLE FAILURE TO PERFORM AND OTHER NON-TERMINATION ACTIONS**

3714.1 If the contracting officer determines before issuing the termination notice that the failure to perform is excusable in accordance with the contract clause required under §3700.8, the contract shall not be terminated for default. If termination is in the best interests of the District, the contracting officer may terminate the contract for the convenience of the District.



3714.2 If the contracting officer has not been able to determine before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination.

3714.3 When the contracting officer determines that some action other than a termination for default is in the best interests of the District, the contracting officer may take any one of the following actions:

- (a) The contracting officer may permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule;
- (b) The contracting officer may permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party; Provided, that the rights of the District shall be adequately preserved; or
- (c) If the requirement for the supplies and services in the contract no longer exists, and the contractor is not liable to the District for damages, the contracting officer may execute a no-cost settlement.

3714.4 The contracting officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination, after the contracting officer makes a written determination that the supplies or services are still required and reinstatement is in the best interests of the District.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1703 (February 26, 1988).

#### **3715 TERMINATION OF COST-REIMBURSEMENT CONTRACTS FOR DEFAULT**

3715.1 The termination clause of a cost-reimbursement type contract shall require the contracting officer to provide the contractor with at least ten (10) days notice before issuance of a notice of termination for default.

3715.2 Settlement of a cost-reimbursement contract terminated for default shall be in accordance with the provisions of §3703, except as follows:

- (a) The costs of preparing the contractor's settlement proposal shall not be allowable; and
- (b) The contractor shall be reimbursed for all allowable costs, and an appropriate reduction shall be made in the total fee, if any.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1703 (February 26, 1988).

#### **3716 REPURCHASE AGAINST CONTRACTOR'S ACCOUNT**

3716.1 When the supplies or services under a terminated contract are still required after termination for default, the contracting officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable.

3716.2 The contracting officer shall repurchase similar supplies and services at as reasonable a price as practicable, considering the quality and delivery requirements.

- 3716.3 The contracting officer may repurchase a quantity in excess of the quantity terminated for default when the excess quantity is needed. However, the costs of any items in excess of the undelivered quantity terminated for default shall not be charged against the defaulting contractor.
- 3716.4 Except as provided in §§3716.5 and 3717, the contracting officer shall use the procedures set forth in chapter 15 or chapter 16 of this title, whichever is applicable, to repurchase the terminated supplies or services, or any additional requirements needed.
- 3716.5 Except as provided in §3717, if the supplies or services are required immediately, the contracting officer may reprocur the required supplies or the services on an emergency basis in accordance with the provisions of chapter 17 of this title. The period of performance for any services repurchased shall not exceed the limits specified in chapter 17 of this title.
- 3716.6 If repurchase is made at a price greater than the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs, such as transportation or discounts.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1704 (February 26, 1988).

#### **3717 SURETY TAKEOVER AGREEMENTS**

- 3817.1 The contracting officer shall carefully consider proposals by the surety concerning completion of the work. The contracting officer shall take action on the basis of the District's interests, including the possible effect of the action upon the District's rights against the surety.
- 3717.2 If the surety offers to complete the contract work, the contracting officer shall accept the offer unless the contracting officer has reason to believe that the persons or firms proposed by the surety to complete the work are not competent or qualified and the interests of the District would be substantially prejudiced.
- 3717.3 If the surety conditions its offer of completion upon the execution by the District of a "takeover" agreement fixing the surety's rights to payment from unpaid prior earnings (retained percentage and unpaid progress estimates), the contracting officer may, at any time after the effective date of the termination, enter into a written agreement with the surety.
- 3717.4 The takeover agreement shall provide for the surety to complete the work according to all the terms and conditions of the contract and for the District to pay the surety the balance of the contract price, less any setoffs or assessed damages, but not in excess of the surety's costs and expenses, in the manner provided by the contract subject to the following conditions set forth in §§3717.5 through 3717.8.
- 3717.5 Under a takeover agreement, any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before



termination, shall be subject to debts and assessed damages due the District by the contractor.

3717.6 The takeover agreement shall not waive or release the District's right to liquidated damages for delays in completion of the work, except to the extent that they are excusable under the contract.

3717.7 If the contract proceeds have been assigned to a financing institution, the surety may not be paid from unpaid earnings under a takeover agreement, unless the assignee consents to the payment in writing.

3717.8 Under a takeover agreement, the surety shall not be paid any amount in excess of its total expenditures necessarily made in completing the work and discharging its liabilities under the payment bond of the defaulting contractor.

3717.9 The contracting officer shall make payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor only on the basis of one (1) of the following:

- (a) Mutual agreement between the District, the defaulting contractor, and the surety; or
- (b) Order of a court of competent jurisdiction.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1705 (February 26, 1988).

## 3799 DEFINITIONS

3799.1 When used in this chapter, the following terms and phrases shall have the meanings ascribed:

**Completed supplies** - supplies that are completely manufactured and ready for delivery.

**Cure notice** - a notice in writing in which the contracting officer specifies a contractor's failure to perform some provision of the contract or failure to make sufficient progress on contract performance so as to endanger performance of the contract. The notice includes a period of time in which the contractor will be allowed to cure the failure.

**Director** - the Director of the Department of Administrative Services.

**District property account** - an accounting of property owned by the District.

**Effective date of termination** - the date on which the notice of termination requires the contractor to stop performance under the contract. If the termination notice is received by the contractor subsequent to the date fixed for termination, then the effective date of termination is the date the notice is received by the contractor.

**Other work** - any current or scheduled work of the contractor, whether governmental or commercial, other than work related to the terminated contract.

**Partial termination** - the termination of a part, but not all, of the work that has not been completed and accepted under a contract.

**Settlement agreement** - a written agreement in the form of a modification to a contract settling all or a severable portion of a settlement proposal.

**Settlement proposal** - a proposal for effecting settlement of a contract terminated, in whole or in part, submitted by a contractor or subcontractor.

**Show cause notice** - a notice in which the contracting officer notifies the contractor in writing of the possibility of a termination for default. The notice calls the contractor's attention to the contractual liabilities if the contract is terminated for default, and requests the contractor to show cause why the contract should not be terminated for default.

**Terminated portion of the contract** - the portion of a terminated contract that relates to work or end items not completed and accepted before the effective date of termination and is that portion of the contract which the contractor is not to continue to perform. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of or payment for individual items of work before termination.

**Termination for default** - the exercise of the District's contractual right to terminate, completely or partially, a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

**SOURCE:** Final Rulemaking publishing at 35 DCR 1706 (February 26, 1988).